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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.J., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

NANCY J.,

Defendant and Appellant.

E039891

(Super.Ct.No. J-205020)

OPINION

APPEAL from the Superior Court of San Bernardino County. James C. McGuire,
Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and
Appellant.

Dennis E. Wagner, Interim County Counsel, and Dawn M. Messer, Deputy
County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Minor.

Mother appeals from the jurisdictional and disposition findings and orders of the juvenile court in which the court declared mother's daughter, M.J. (born in 1997), a dependent of the court, and ordered her removed from mother's care. Mother contends there was insufficient evidence to support the court's jurisdiction order, which was founded on the court's finding that mother's boyfriend sexually molested M.J. Mother also argues that there was insufficient evidence supporting the lower court's order removing M.J. from mother's care.

We conclude there was substantial evidence supporting the juvenile court's jurisdictional and disposition orders, and affirm the judgment.

1. Factual and Procedural Background

The Department of Children's Services (DCS) removed M.J. from mother's care after mother was arrested in November 2005, on an outstanding warrant. The warrant was for violating a restraining order related to charges initiated by mother's boyfriend, Glenn, against mother for burglary, stalking, terrorist threats and vandalism.

At the time of mother's arrest, mother was living with M.J. in a motel. Mother claimed she was living there to get away from Glenn, who had molested M.J. M.J.'s father lived out-of-state and had not been involved in M.J.'s life.

The DCS filed a juvenile dependency petition in November 2005, alleging that M.J. came within the provisions of Welfare and Institutions Code section 300,

subdivisions (b), (d), and (g)¹: that there was a substantial danger to her physical health, safety, protection, or physical or emotional well-being if returned home; no reasonable means existed to protect M.J. other than removing her from mother's care; mother suffered from mental illness which at times prevented her from protecting M.J. from abuse and neglect; M.J. was sexually abused by mother's boyfriend, Glenn; mother knew or reasonably should have known M.J. was at risk of being molested and failed to protect her; and M.J.'s father's whereabouts were unknown.

Mother's relatives informed the DCS that they were concerned about mother's mental stability. Mother's grandmother said she was in the process of legally evicting mother from grandmother's home because of mother's bizarre behavior and failure to pay her phone and utility bills.

In November 2005, the juvenile court ordered M.J. detained and placed her in foster care. Mother was released from jail in December 2005. The DCS recommended M.J. remain in foster care and mother undergo a psychiatric evaluation to determine her ability to parent M.J.

In January 2006, DCS social worker, Nita McGee, interviewed mother, M.J., and Glenn concerning allegations that Glenn had sexually abused M.J. Mother claimed Glenn had sexually abused M.J. on several occasions. M.J. said that Glenn did not physically touch her but walked out of the shower naked and did other things that made her uncomfortable. M.J. was vague in her recollection of such incidents.

¹ Unless otherwise noted, all statutory references are to the Welfare and
[footnote continued on next page]

Mother acknowledged that juvenile dependency proceedings were initiated against her in 1998 and 1999. The DCS in Los Angeles filed juvenile dependency petitions concerning M.J. because mother had mental problems, was homeless, and had attempted to abandon M.J. During a psychological evaluation in 1998, mother was diagnosed with schizophrenia, which the psychologist concluded placed M.J. at risk.

Glenn denied molesting MJ and said his relationship with mother ended because of her increasingly bizarre behavior. He claimed he continued to give mother money because he felt sorry for her. But when mother's threats became violent, he reported them to the police and pressed criminal charges against her. Glenn believed mother suffered from mental illness and she needed treatment.

Also in January, Jane Kilbourne, a forensic interview specialist at the Children's Assessment Center, interviewed M.J. M.J. told Kilbourne "something had happened to her that was not OK," involving Glenn. She said he "did things that were inappropriate." Glenn had "done touching all over her body." When asked how many times Glenn touched her, M.J. said that when she was seven years old, he touched her "pee-pee" once, her "butt" twice, and her "boobies" five times. She kept track of the touchings on a piece of paper in the event she had to tell the police. M.J. spoke to the Hemet and Temecula Police. M.J. said that after each incident, mother continued to take her back to Glenn's residence. Mother told her she knew Glenn had touched her but she would be right back.

[footnote continued from previous page]
Institutions Code.

At the jurisdictional and disposition hearings in January and February, 2006, mother reasserted that Glenn had molested M.J. in 2002. She testified that in 2002 mother suspected Glenn had been sexually abusing M.J. because M.J. was experiencing pain urinating and was bleeding a little. Mother reported the abuse to the Hemet police and took M.J. to the hospital for an examination but was told there was no evidence of molestation. Afterwards, mother allowed Glenn periodically to care for M.J. without supervision because at that time mother did not believe Glenn had sexually abused M.J.

According to mother, M.J. first told her and her great-aunt about Glenn molesting her in June 2005. Mother reported the abuse to the Long Beach Police Department. The report was transferred to the Riverside Police Department. Mother did not follow up on the allegations because Glenn had threatened her if she contacted the police.

Mother claimed her relationship with Glenn was over and she had not allowed M.J. to see him since M.J. had reported the abuse. Mother also denied she had any mental or emotional problems.

M.J.'s maternal great-grandmother testified that in February 2004, mother told her Glenn had molested M.J.

At the conclusion of the jurisdictional and disposition hearing the trial court made the requisite jurisdiction findings and found by a preponderance of the evidence that all allegations contained in the dependency petition were true. The trial court then made the requisite disposition findings and found that M.J. came within the provisions of section 300, subdivisions (b), (d), and (g): that returning M.J. to mother would place her at risk; no reasonable means existed to protect M.J. other than removing her from mother's care;

mother suffered from mental illness which at times prevented her from protecting M.J. from abuse and neglect; and M.J. had been sexually abused by Glenn, and mother was aware of it yet failed to protect her. The trial court ordered M.J. removed from mother's physical custody and placed her in the care, custody, and control of the DCS.

After ordering M.J.'s removal, the trial court encouraged mother to get treatment for her mental condition. The court advised mother: "You will notice in your case plan . . . there's a serious component for you dealing with your mental health issues. I want to advise you that I have very serious concerns about you dealing with your mental health issues and how they relate to your parenting ability. [¶] So, it is very important that you deal with those immediately. [¶] If you'll recall, the one doctor indicated that it is not unusual for this type of schizophrenia to onset at your stage in life in women. And I strongly believe it has. And I would urge you, for [M.J.'s] sake, to seek all the assistance that you can get, and all services that you can avail yourself of."

2. Sufficiency of Evidence of Sexual Abuse

Mother challenges the sufficiency of evidence supporting the trial court's jurisdictional ruling that M.J. came within section 300, subdivision (d). Section 300, subdivision (d) provides that a child may be adjudged a dependent child of the court if the child has been, or there is a substantial risk that the child will be, sexually abused by a parent or guardian. Mother argues there was insufficient evidence Glenn sexually abused M.J.

A. Waiver

The DCS argues that mother waived or, rather, forfeited her objection because she did not raise it in the trial court. The DCS urges us to find that, because mother testified Glenn molested M.J. and failed to object in the trial court to the court finding jurisdiction based on molestation, mother forfeited her objection.

When jurisdiction is contested, a parent is not required to object to the social service agency's failure to carry its burden of proof. "Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule.' [Citations.]" (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) Therefore, a claim that there was insufficient evidence to support jurisdiction at a contested hearing is not waived by failure to argue the issue in the juvenile court. (*Ibid.*; see also *In re Erik P.* (2002) 104 Cal.App.4th 395, 399.) Waiver, under most circumstances, is disfavored. (*Ibid.*)

Here, even though mother did not object in the trial court, she may nevertheless argue on appeal that the juvenile court's finding of jurisdiction under section 300, subdivision (d) was not supported by substantial evidence. We therefore address the merits of the mother's objection.

B. Sufficiency of Evidence of Molestation

Mother contends there was insufficient evidence to support the court's finding that Glenn molested M.J. Neither M.J.'s nor mother's testimony and out-of-court statements

accusing Glenn of molesting M.J. were credible, and there was no other evidence supporting the finding. We disagree.

A jurisdictional finding must be upheld on appeal if there is any substantial evidence to support it. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) In applying the substantial evidence rule, the appellate court must presume in favor of the judgment all reasonable inferences which can be drawn from the evidence. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1632-1633.) Where conflicting inferences may be drawn from the evidence, the reviewing court ordinarily defers to the trial court's decision as to which inferences are appropriate. (*Rocco M., supra*, at p. 820.)

Mother cites *In re Sergio C.* (1999) 70 Cal.App.4th 957, 960, for the proposition that an allegation by a witness who lacks credibility does not amount to substantial evidence. In *Sergio C.*, a juvenile dependency case, the trial court sustained the dependency petition and ordered the father, who had custody of the children, to submit to random drug testing based on the mother's out-of-court statement to the DCS that the father used and sold drugs. The mother was a drug addict and had abandoned her children. The *Sergio C.* court reversed the drug testing order, concluding there was insufficient evidence to support the drug testing order since the only evidence the father used and sold drugs was the mother's unsworn, unconfirmed allegation, which the father denied.

Sergio C. is inapposite. In the instant case, there was far more evidence supporting the sexual molestation allegations than an unsworn, out-of-court statement by mother and M.J. In addition to mother and M.J.'s out-of-court statements, they both

testified that Glenn sexually abused M.J. There was also other supporting evidence. Mother testified at the jurisdiction hearing that she believed Glenn had molested M.J. She first suspected the abuse in 2002. On a number of occasions mother and M.J. reported the abuse to the police, including the Long Beach, Hemet, and Temecula police departments, and to the DCS. Mother also told family members, including M.J.'s maternal great-grandmother and great-aunt. In addition, believing M.J. had been sexually abused, mother took M.J. to the hospital for an examination. However, no physical signs of abuse were found.

M.J. testified she told mother each time Glenn molested her but mother continued to leave her alone with Glenn.

The forensic interview specialist at the Children's Assessment Center testified that M.J. told her Glenn had inappropriately touched her several times, including in the vaginal area and on the buttocks and breasts. When M.J. told her mother, mother took her to the Hemet Police and reported it.

M.J.'s maternal great-grandmother testified mother told her in February 2004, that Glenn had molested M.J.

Although, as mother argues, there was reason to question mother's and M.J.'s credibility, including the fact mother was diagnosed as schizophrenic and mentally unstable, we must defer to the trier of fact's evaluation of the facts. When reviewing an order challenged on grounds of insufficient evidence, the reviewing court views the evidence in the light most favorable to the trial court's order, drawing every reasonable inference and resolving all conflicts in favor of the court's ruling. (*In re Misako R.*

(1991) 2 Cal.App.4th 538, 545; *In re Katrina C.* (1988) 201 Cal.App.3d 540, 547; *In re Rocco M., supra*, 1 Cal.App.4th at p. 820.)

Here, there was substantial evidence supporting the trial court's finding that Glenn sexually abused M.J. Accordingly, there was no error in finding jurisdiction over M.J. under section 300, subdivision (d).

3. Disposition Order Removing M.J. From Mother's Care

Mother argues that the juvenile court erred in removing M.J. from mother's custody. She claims the trial court's finding that it would be detrimental to maintain M.J. in mother's care was not supported by substantial evidence. In addition, mother asserts there was no consideration of alternative reasonable means of protecting M.J. without removing her from mother's care.

A. Standard of Review

Although the standard for removal under section 361 is clear and convincing evidence in the juvenile court, an appellate court reviews the juvenile court's findings for sufficiency of the evidence. "When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing evidence, the reviewing court must determine if there is any substantial evidence-that is, evidence which is reasonable, credible and of solid value-to support the conclusion of the trier of fact. [Citations.]" (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) In making this determination, we may not reweigh the evidence or pass on the credibility of witnesses but rather must resolve all conflicts and indulge all

legitimate inferences in favor of the prevailing party. (*In re Jasmine C.*, *supra*, at p. 75; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

B. Substantial Evidence Supports the Juvenile Court's Order

In order to remove a minor child from the care of a parent, the juvenile court must find by clear and convincing evidence that the removal is necessary to protect the child. (§ 361, subd. (c); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) A removal order is proper if it is based upon proof of parental inability to provide proper care for the child, as well as proof of a potential detriment to the child if he or she remains with the parent. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.) The focus of the removal statute is to avert harm to the child. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536, citing *In re B.G.* (1974) 11 Cal.3d 679, 699.)

Here, there was sufficient evidence to support the removal order. As discussed in the previous section of this opinion, there was substantial evidence that Glenn sexually abused M.J. and that mother knew about it but nevertheless left M.J. alone with Glenn.

Mother argues that M.J. was no longer at risk of being sexually abused by Glenn because, according to mother's testimony at trial, mother was no longer involved with Glenn and refused to allow Glenn to see M.J. However, as mother acknowledges in her appellant's opening brief, the trial court was entitled to disbelieve mother's testimony in this regard and find that mother was not a credible witness. Even assuming mother's relationship with Glenn is over, there is evidence she continues to interact with him. She has been charged with stalking Glenn, has been receiving financial support from him, and

elicited M.J. to leave a threat on his voicemail stating, “You’ll be a good daddy when you’re a dead daddy.”

In addition to any risk attributable to mother’s ongoing interaction with Glenn, mother’s mental condition also places M.J. at risk. Mother argues that, even assuming she has a mental illness, removal is not warranted because there is no evidence that M.J. would be at risk if placed in mother’s care. Mother claims that up until the juvenile dependency proceedings, M.J. was a well-adjusted child who had lived with mother for several years and there was thus no basis for removing her from mother’s care.

But contrary to mother’s claims, M.J. was experiencing problems while in mother’s care. M.J. was claiming Glenn was sexually abusing her and, despite telling mother about each instance of abuse, mother was allowing it to continue by not following up on reports to the police and by continuing to leave M.J. alone with Glenn. Also, mother’s mental instability and its impact on M.J. are reflected by mother’s acts of allegedly stalking Glenn and involving M.J. in harassing him.

Additional evidence of mother’s mental problems and their impact on M.J. is also apparent from her juvenile dependency history in which the DCS removed M.J. from mother’s care in 1998 and again in 1999, due to mother’s mental health problems and unstable lifestyle.

In 1998, mother underwent a psychological evaluation in which the psychologist reported mother suffered an “Initial Psychotic Break,” and exhibited symptoms of schizophrenia. For instance, mother was under the misconception that she had bachelor’s

and master's degrees from Harvard and Yale, and a Ph.D. from Oxford, whereas she actually had failed to complete her first year at U.C.L.A.

The psychologist concluded in his evaluation report that mother's mental illness at that time interfered with her ability to care for M.J. because she might unintentionally neglect her. This proved to be true, as reflected in the instant case. After the previous juvenile dependency proceedings were terminated and M.J. was returned to mother, the instant proceedings were initiated based on mother's mental instability and failure to protect M.J. from being molested.

Unlike in *In re Steve W.* (1990) 217 Cal.App.3d 10, and *In re Jamie M.* (1982) 134 Cal.App.3d 530, cited by mother, there is ample evidence supporting the trial court's finding that returning M.J. to mother would place M.J. at risk due to mother's mental condition. In *Steve W.*, the mother had a history of becoming involved with physically abusive men. After leaving her first abusive mate, she became involved with another abusive man who inflicted injuries killing her oldest son. As a consequence, the DCS removed the mother's other son from her custody. By the time of the dispositional hearing, the mother had begun counseling, was living in her own apartment, had a job, and was self-supporting. In *Steve W.*, the court found that the DCS's assertions that the mother might become involved with another abusive man were pure speculation and therefore there was insufficient evidence to support the removal order. (*In re Steve W.*, *supra*, at p. 23.) Here, there is evidence that mother's mental condition was placing M.J. at risk.

Jamie M. is also distinguishable because in *Jamie M.* there was no evidence that the child was at risk due to the mother's mental condition. (*In re Jamie M.*, *supra*, 134 Cal.App.3d at pp. 540-542.) In the instant case, there were prior dependency proceedings in which a psychologist warned that mother would likely neglect M.J. due to mother's deteriorating mental condition. There was also evidence in the instant dependency case showing that this did in fact occur and is likely to continue.

In addition, mother did not have a permanent residence. She had been living in a motel with M.J. after her grandmother kicked her out of her home due to mother's bizarre behavior and inability to pay her utility and telephone bills. Mother's only means of support was money from Glenn, and mother had insisted he stop giving her money.

Under these circumstances, there is sufficient evidence supporting the trial court's order removing M.J. from mother's care. There is substantial evidence that mother has a significant mental condition requiring treatment; mother left M.J. alone with Glenn, even though M.J. repeatedly told her that Glenn was sexually abusing M.J.; and mother's mental condition put M.J. at risk of being neglected and harmed. The trial court reasonably concluded that, until mother received treatment for her mental illness, M.J. would remain at risk in her care.

Mother's contention that the juvenile court failed to consider alternative reasonable means of protecting M.J. without removing her from mother's care lacks merit since the record indicates there were no reasonable alternatives and mother does not suggest any.

4. Disposition

The juvenile court's findings and orders are affirmed.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.